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Land Use Controls and Federal Common Law in Real Property Transfers

MAJ Kenneth J. Tozzi

I. ***Introduction***. A question has arisen regarding whether federal case law could be read to find a federal property right sufficiently strong to supersede traditional state common law rules in the area of land use controls (LUCs). Specifically, in states that have not enacted statutes in the area of land use controls, there is some support for the notion that federal property interests could be used to enforce LUCs even though under traditional state law the LUC (likely a deed restriction on future use of the land) would not be enforceable. The lack of enforceability would be predicated upon the fact that the covenant did not run with the land[1] in a transfer to a subsequent transferee, and an equitable servitude[2] was not recognized in that particular state.

II. ***Case Law***. There are three federal cases in this area which could lend support to the position that federal property law interests trump state property law based in common law in the area of land use.

a. ***United States v. Little Lake Misere Land Co***.[3] In this case the U.S. Supreme Court considered the question of whether a Louisiana statute which had the effect of making a reservation of mineral rights "imprescriptible" with respect to lands acquired by the United States subject to reservations was properly applied. Pursuant to the Migratory Bird Conservation Act[4] the United States acquired two parcels of land in Louisiana, one by deed

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[1] A Covenant Running With the Land is a covenant which goes with the land, as being annexed to the estate, and which cannot be separated from the land, and transferred without it. Essentials of a covenant running with the land are that the grantor and grantee must have intended that the covenant run with the land, the covenant must effect or concern the land with which it runs, and there must be privity of estate between the party claiming the benefit and the party who rests under the burden. Black's Law Dictionary, Fifth Edition, p. 329, ***citing*** Greenspan v. Rehberg, 56 Mich. App. 310, 224 N.W. 2d 67,73.

[2] An Equitable Servitude is "A restriction on the use of land enforceable in court of equity. It is broader than a covenant running with the land because it is an interest in land." Black's Law Dictionary, Fifth Edition, p. 484.

[3] U.S. v. Little Lake Misere Land Co., 412 U.S. 580 (1973).

[4] Migratory Bird Conservation Act, 16 U.S.C § 715 ***et seq***.

in 1937, and one by condemnation in 1939.[5] Both the deed and condemnation judgment reserved oil, gas, sulphur, and other mineral rights to the Little Lake Misere Land Company for a period of 10 years.[6] At the end of ten years (assuming other conditions had not been met) the reserved rights would terminate, and complete fee title would become vested in the United States.[7] The parties stipulated that the fee title ripened 10 years from the date of creation of the rights.[8] Little Lake relied upon Louisiana Act 315 of 1940[9] in continuing to claim their mineral rights. Little Lake claimed that the Act of 1940 rendered inoperative the conditions set forth in the deed and judgment for the extinguishment of the reservations.[10] In reversing the federal district court and the federal court of appeals for the 5th Cicuit the U.S. Supreme Court held that the federal land interests were not necessarily defined by state law, and Louisiana's Act of 1940 does not apply to the mineral reservations agreed to by the parties.[11] The Court ruled that since the land acquisition agreement was explicitly authorized, though not precisely governed by the Migratory Bird Conservation Act, and since the United States was a party to the agreement, it would be construed by federal law.[12] The Court ruled that the Louisiana law would not be borrowed in this case since it was plainly hostile to the interests of the United States.[13] Finally, the Court held that the terms of the agreements were unequivocal regarding the termination of the reservations.[14] In a telling passage, the court stated:

> "To permit state abrogation of the explicit terms of a federal land acquisition would deal a serious blow to the congressional scheme contemplated by the Migratory Bird Conservation Act and indeed all other federal land acquisition programs. These programs are national in scope. They anticipate acute and active bargaining by officials of the United States charged with making the best possible use of limited federal conservation appropriations. Certainty and finality are indispensable in any land transaction, but they are especially critical when, as here, the federal officials carrying out the mandate of Congress irrevocably commit scarce funds."[15]

Equally noteworthy in this case is the fact that the Court rejected the government's argument that "[V]irtually without qualification, …land acquisition

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[5] Little Lake Misere, 412 U.S. 580 at 582.

[6] ***Id***.

[7] ***Id***. at 583.

[8] ***Id.*** at 584.

[9] Louisiana Act 315 of 1940, La. Rev. Stat. § 9:5806 A (Supp. 1973) provides: "When land is acquired by conventional deed or contract, condemnation or expropriation proceedings by the United States of America, or any of its subdivisions or agencies from any person, firm or corporation, and by the act of acquisition, order or judgment, oil, gas or other minerals or royalties are reserved, or the land so acquired is by the act of acquisition conveyed subject to a prior sale or reservation of oil, gas or other minerals or royalties, still in force and effect, the rights so reserved or previously sold shall be imprescriptible."

[10] Little Lake Misere, 412 U.S. 580 at 584.

[11] ***Id***. at 590-604.

[12] ***Id***. at 590-593.

[13] ***Id***. at 594-597.

[14] ***Id***. at 604.

[15] ***Id.*** at 597.

agreements of the United States should be governed by federally created federal law."[16]

b. ***United States v. Albrecht***.[17] In this case the principle set out in ***Little Lake Misere*** was extended. In ***Albrecht*** the federal court of appeals for the 8th circuit affirmed a district court holding ordering a farmer to restore drainage ditches on his land and permanently enjoining further drainage of potholes on the land.[18] The issue arose from a waterfowl easement to the United States Fish and Wildlife Service (USFWS) which included a prohibition against draining prairie potholes on the land.[19] Through aerial surveillance the USFWS discovered that ditching was present on the land in question in violation of the terms of the easement.[20] The defendant argued that North Dakota law did not recognize waterfowl easements, and that the easement was therefore invalid.[21] Relying on ***Little Lake Misere*** the court stated:

> "[U]nder the context of this case, while the determination of North Dakota law in regard to the validity of the property right conveyed to the United States would be useful, it is not controlling, particularly if viewed as aberrant or hostile to federal property rights. Assuming ***arguendo*** that North Dakota law would not permit the conveyance of the right to the United States in this case, the specific federal governmental interest in acquiring rights to property for waterfowl production areas is stronger than any possible "aberrant" or "hostile" North Dakota law that would preclude the conveyance granted in this case. ***Little Lake***, supra at 595, 596. We fully recognize that laws of real property are usually governed by the particular states; yet the reasonable property right conveyed to the United States in this case effectuates an important national concern, the acquisition of necessary land for waterfowl production areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right. To hold otherwise would be to permit the possibility that states could rely on local property laws to defeat the acquisition of reasonable rights to their citizens' property pursuant to 16 U.S.C § 718d(c) and to destroy a national program of acquiring property to aid in the breeding of migratory birds. We, therefore, specifically hold that the property right conveyed to the United States in this case, whether or not deemed a valid easement or other property right under North Dakota law, was a valid conveyance under federal law and vested in the United States the rights as stated therein. Section 718d(c) specifically allows the United States to acquire wetland and pothole areas and the "interests therein."[22]

c. ***North Dakota v. United States***.[23] This case also dealt with federal acquisition of waterfowl easements. Section 3 of the Wetlands Loan Act of 1961[24] provided for state

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[16] ***Id***. at 595.

[17] United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974).

[18] ***Id***. at 912.

[19] ***Id***. at 908.

[20] ***Id***. at 909.

[21] ***Id***.

[22] ***Id***. at 911.

[23] North Dakota v. United States, 460 U.S. 300 (1983).

[24] Pub. Law 87-883, 75 Stat. 813.

governor approval of waterfowl habitats. Between 1961 and 1977 the governors of North Dakota consented to the acquisition of easements covering approximately 1.5 million acres of wetlands in North Dakota.[25] In the mid-1970's cooperation between the state and federal government began to break down.[26] In 1977 North Dakota enacted statutes restricting the ability of the United States to acquire easements over wetlands, permitting landowners to drain wetlands created after the negotiation of the waterfowl easements, and limiting the maximum terms of easements to 99 years.[27] The Court ruled that gubernatorial consent could not be revoked at will, as nothing in the federal legislation authorized the withdrawal of approval previously given.[28] Citing to ***Little Lake Misere*** the Court further ruled that the state law provisions authorizing the drainage of after-created wetlands and limiting the terms of easements to 99 years were hostile to federal interests and may not be applied.[29] The Court stated "The United States is authorized to incorporate into easement agreements such rules and regulations as the Secretary of the Interior deems necessary for the protection of wildlife, 16 U.S.C § 715e, and these rules and regulations may include restrictions on land outside the legal description of the easement."[30]

III. ***Application to U.S. Army Land Use Controls***. The cases set out above arguably set up a federal position of strength in those states where land use controls are difficult to enforce under traditional common law property doctrines. The position that federal interests would be viewed as superior to aberrant or hostile state laws could certainly be argued in an attempt to enforce land use controls against subsequent transferors. It appears, however, that there are factors that distinguish the rule of the above cases from the scenario the Army may find itself faced with in the enforcement of land use controls.

The paramount limiting factor of the above cases is the fact that the federal courts were deciding state-federal disputes in which federal action was backed by specific federal law (Migratory Bird laws) authorizing the United States to acquire wetlands and the "rights therein." State legislation was then passed to specifically undermine the federal interests as enunciated in the statutes. Under these circumstances the federal courts were willing to elevate the federal interest over the state interest.

In the context of land use controls we are dealing with a situation in which there really is no federal law authorizing or encouraging the creation of federal rights. The Army could argue that the purposes of human health and environmental protection under environmental statutes provide a federal interest akin to the federal interests in land acquisition in the above cases. The states could counter, however, that outside of the environmental statutes, public health and safety, and traditional police powers are local in nature. In addition, real property law is a traditional area of state law preeminence. Rather than the existence of state laws hostile to federal interests, we are most concerned with the absence of state law in the area of LUCs which potentially impedes the future enforcement of LUCs. This situation is distinguishable from the case law described above.

Based upon the foregoing, I recommend that the ***Little Lake Misere*** line of cases be used as a fallback position should traditional state law enforcement mechanisms fail in future attempts to enforce LUCs. Working within existing state property laws is a more reasonable

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[25] North Dakota v. U.S., 460 U.S. 300 at 305.

[26] ***Id***. at 306.

[27] ***Id***. at 306-308.

[28] ***Id***. at 312-316.

[29] ***Id***. at 316-320.

[30] ***Id***. at 319.

approach in light of an analysis of the case law and its application to situations we are likely to face in the transfer of Army properties. (MAJ Tozzi/ RNR)

Friends of the Earth Has Friends at the Court

Major Tim Connelly

On January 12, 2000 the Supreme Court decided the latest in a series of significant environmental standing cases.[31] In ***Friends of the Earth v. Laidlaw Environmental Services, Inc***., the Court addressed Article III standing requirements, deciding that citizen-suit plaintiffs have standing to bring an action for civil penalties payable to the United States Treasury. The seven to two majority, however, remanded, directing the lower courts to decide whether or not the case was now moot, the basis upon which the Fourth Circuit had dismissed the action.[32] The decision in this closely watched case arguably lowers the standard of proof for environmental plaintiffs to pursue citizen suits to enforce environmental laws.

The state of South Carolina issued a National Pollution Discharge Elimination System (NPDES) permit to Laidlaw shortly after Laidlaw bought a hazardous waste incineration facility in that state in 1986. The permit allowed Laidlaw to discharge wastewater into the North Tyger River, subject to effluent limitations on specified pollutants. Laidlaw exceeded permit limits almost 500 times between 1987 and 1995.

Friends of the Earth[33] properly gave 60 days notice to Laidlaw, the EPA, and the state, of its intent to file a citizen-suit to enforce the effluent limitations in Laidlaw's permit.[34] In response, Laidlaw invited South Carolina to sue it, drafted a complaint for the state, and reached a settlement with regulators on the 59th day of the 60 day notice period. The settlement required Laidlaw to pay a $100,000 penalty, and to promise make "every effort" to comply with the permit.

Before the District Court, Laidlaw challenged plaintiffs' standing to sue and argued that the state's "diligent prosecution" precluded further citizen enforcement.[35] The district court denied both motions, finding that plaintiffs proved standing "by the slimmest of margins" and that the state's enforcement was not "diligent prosecution."

Five years later, the district court rendered final judgment, making several critical findings. First, the district court found that Laidlaw had violated its NPDES permit 36 times between the start of the lawsuit and the final judgment. Second, that Laidlaw had enjoyed $1,092,581 economic benefit through its pattern of non-compliance before the suit was brought. Third, that Laidlaw's permit violations did not harm the environment or human health. Fourth, that, notwithstanding the 36 violations, Laidlaw had been in substantial compliance with its permit since 1992. As a consequence of this last finding, the court

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[31] Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 2000 U.S. Lexis 501, January 12, 2000. Last year, the Court decided Steel Co. v. Citizens for a Better Env't, 140 L. Ed. 2d 210, 118 S. Ct. 1003, 1016-17 (1998)(finding no standing for citizens seeking civil penalties for wholly past violations of the Emergency Planning and Community Right to Know Act); in 1997, Bennett v. Spear found that ranchers had standing, under the prudential "zone of interests" test to challenge Fish and Wildlife Service's biological opinion proposing restricted use of reservoir water in order to protect endangered sucker fish.

[32] Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 149 F.3d 303 (4th Cir. 1998).

[33] Citizens Local Environmental Action Network (CLEAN) and the Sierra Club also joined as plaintiffs.

[34] 33 U.S.C. §1365(b)(1)(A).

[35] 33 U.S.C. §1365(b)(1)(B).

denied plaintiff's prayer for injunctive relief. Instead, it imposed $405,800 in civil fines, to be paid to the United States Treasury, an appropriate amount, the trial court felt, given its "total deterrent effect."

Friends of the Earth appealed to the Fourth Circuit, contending that the civil fine was inadequate. It did not appeal the denial of injunctive relief. Laidlaw, in turn, cross appealed and pressed its position that the plaintiffs lacked standing and that the action was barred by South Carolina's diligent prosecution.

In an unusual twist, the Fourth Circuit assumed that plaintiffs had standing, but dismissed the case for mootness. The Fourth Circuit reasoned that a plaintiff must maintain the three elements of standing throughout the litigation, or the case becomes moot. The court observed that civil penalties were "the only remedy currently available" because the district court declined to grant injunctive relief. It concluded that civil penalties paid to the United States would not redress plaintiffs' claimed injury, and plaintiffs' case was moot.[36] Once again, Friends of the Earth sought review, and the Supreme Court granted certiorari.

Justice Ginsburg wrote the majority opinion for the Supreme Court. After reviewing the procedural history of the case, her opinion undertook the standing analysis the Fourth Circuit had assumed away. Because standing must be found in every federal case, Justice Ginsburg analyzed standing on the record available to the District Court.

In federal courts, the concept of standing has a well-settled constitutional basis, firmly rooted in the so-called "case or controversy" requirements of Article III, § 2.[37] To prove standing to sue, a plaintiff must show three elements: injury in fact, causation, and redressability. Injury in fact is harm that is real and concrete, not merely speculative or conjectural. Causation reasonably requires a nexus between the action or inaction of the defendant and the claimed injury. To show redressability, a plaintiff must show that some relief the court might award would rectify plaintiff's harm.[38]

Federal Courts have recognized that harm to recreational and aesthetic interests can suffice to show standing since at least the case of Sierra Club v. Morton.[39] In this case, the Court agreed that the record, largely in the form of affidavits, showed generally that plaintiffs were "concerned" with the pollution from Laidlaw's facility and avoided using the river into which it discharged its waste water. There was also evidence that one plaintiff "believed" that pollution discharge accounted for the low value of her home relative to similar homes more distant from Laidlaw's facility. Laidlaw countered that the District Court specifically found that none of Laidlaw's discharges had harmed the environment, and so could not have caused

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[36] Citing the Supreme Court's recent Steel Company decision, Note 1.

[37] In fact, that section does not address "cases or controversies" in so many words. The relevant text states that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[38] Steel Co. v. Citizens for a Better Env't, 140 L. Ed. 2d 210, 118 S. Ct. 1003, 1016-17 (1998).

[39] 405 U.S. 727, 735 (1972).

the injury plaintiffs claimed. The majority, however, distinguished between a showing of harm to the environment and harm to the plaintiffs' interests. Here, although the defendant's discharges did no harm to the environment, the plaintiffs' "reasonable concerns" about those discharges directly affected their enjoyment of the surrounding area, and led them to avoid use of the North Tyger River.

Justice Ginsburg next discussed the redressability requirement in the context of civil penalties.[40] Laidlaw argued that civil penalties paid to the United States Treasury could not redress the Plaintiffs' claimed loss of aesthetic and recreational enjoyment or any possible economic harm. The majority disagreed, reasoning that the deterrent effect of a civil penalty would redress plaintiffs' injury by making the defendant more likely to meet its permit limitations in the future, resulting in a cleaner river and environment.

Having found standing, the majority turned its attention to the issue the Fourth Circuit found dispositive, whether Laidlaw's voluntary conduct – compliance with its permit after the suit was filed or closing the waste incineration plant altogether – rendered the case moot. Here Justice Ginsburg sympathized with the Fourth Circuit's erroneous application of the Court's past treatment of the mootness doctrine. In the past, the Court had seemingly equated mootness with "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."[41] The majority here, however, held that the correct standard for determining when a defendant's voluntary conduct renders a case moot is not merely whether the elements of standing are met throughout the litigation. Rather, in such a case, the test is whether "it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur" – a test Justice Ginsburg describes as a "formidable burden."

Having properly framed the mootness inquiry, the Court remanded the case. On remand, the parties are free to dispute whether it is absolutely clear that Laidlaw's permit violations are not likely to recur, either because of its voluntary compliance, or because the facility is no longer operating. If so, then the case has been mooted, and presumably subject to dismissal.

Justice Scalia sees in all of this the impending collapse of democratic government. In Scalia's view, Article III is an appropriate starting point for standing analysis, but its three-part test should not the end of the inquiry. The dissent disapproves of citizen suits in general, suggesting that they run afoul of the Article II, § 3 of the Constitution. That provision directs the President to "take Care that the laws be faithfully executed." Because this issue was not considered in the lower courts and was not briefed or argued, however, Justice Scalia did not focus on it in his dissent.[42]

Instead, Justice Scalia analyses the record using the same three part Article III test that Justice Ginsburg applied. He arrives at several very different conclusions. First, he disagrees that the plaintiff's affidavits show cognizable injury in fact. The "concern" they show for the environment falls short of real injury and is based on the type of contradictory, unsubstantiated, conclusory allegations the Court had rejected in a previous standing case.[43] Justice Scalia concludes that a "concern for the environment" standard is a sham that will confer standing any time there is a permit violation.

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[40] All parties agreed that a plaintiff must demonstrate standing with respect to each type of relief it seeks.

[41] Arizonans for Official English v. Arizona, 520 U.S. 43, 68 (1997).

[42] Justice Kennedy, wrote a separate concurrence expressing the same reservations about citizen suits, choosing to reserve judgment for another day, and another case. Friends of the Earth, 2000 Lexis 501, 56.

[43] Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990).

Justice Scalia is no more convinced by the Court's redressability analysis, which he calls "equally cavalier" to its consideration of the injury in fact question. To begin with, the Court had recently held that civil penalties cannot redress citizen injury for past violations of environmental laws.[44] Furthermore, in Scalia's view the deterrent effect of civil penalties in general is speculative, because past Supreme Court cases found no "logical nexus" between the threat of enforcement action and future compliance with various laws. He goes on to analyze the lack of evidence that the specific penalty in this case would serve as a deterrent sufficient to redress plaintiffs' injuries, and concludes that the redressability test was not met.

This case leaves several still unanswered questions, and could have serious consequences. First, what effect would a finding of mootness on remand have on the civil penalty imposed by the district court? Justice Stevens' concurring opinion expresses his view that the penalty should stand, whether or not the case became moot at some point. The majority opinion is silent on this issue. Second, the Court still has not squarely addressed Justice Scalia's argument that citizen suit provisions may run afoul of the "take care" clause of Article II. Justice Kennedy's concurrence indicates that he is sympathetic with those concerns. Finally, the dissent raises legitimate concerns for the effect of the Court's opinion on the law of standing. At the core, standing requirements are a limit on judicial power – recognizing that courts are best suited to resolve concrete disputes between interested parties with something real at stake. By finding that payment of civil penalties to the United States somehow offers "redress" for citizens' "concerns" for the environment, the Court effectively empowers those citizens to usurp the government's enforcement prerogative. Because of the Court's willingness in this case to find injury in fact on such a scant record, it is very likely that more citizens will pursue citizen suits more vigorously. (MAJ Connelly/LIT)

NATIONAL ATLAS OF THE UNITED STATES AVAILABLE ONLINE

MAJ James H. Robinette II

Come forth into the light of things,
Let Nature be your teacher.
-William Wordsworth (1798)

A public-private venture of the U.S. Geological Survey and various federal and non-governmental organizations has made the National Atlas of the United States available on the Internet. The address for the Atlas is http://www.nationalatlas.gov/. Environmental law specialists may find the atlas useful for a number of purposes. It includes zoom in and out features, as well as the ability to include or exclude point sources of pollution, Superfund cites, hazardous waste storage sites, as well as hydrologic, geographic, political, and census data. (MAJ Robinette/RNR)

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Major Robert Cotell

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[44] Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998).

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